

# LEGAL BRIEFS



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## ANESTHETISTS AND THE CRIMINAL LAW

Even though mistakes in anesthesia often lead to death, criminal charges against anesthetists arising from the administration of anesthesia are very unusual, and criminal charges against nurse anesthetists even more rare. There have been some criminal prosecutions of anesthesia providers, but almost all of them involved anesthesiologists. I thought it might be useful to explore one of these cases to help nurse anesthetists develop a greater understanding of the criminal law system. Moreover, a recent criminal prosecution of an anesthesiologist contains lessons not only about criminal prosecution but also about dealing with attorneys and the importance of carefully understanding contracts.

The facts, which gave rise to the case, are fairly easy to understand. A doctor was performing medical procedures that were not covered by many of his patients' insurance policies. The physician and 2 anesthesiologists who assisted him submitted false invoices, operative reports, and other records as if they had performed covered medical procedures. Eventually (the indictment stated that "eventually" was a 10-year period), they were caught. One of the anesthesiologists coop-

erated with the government and pled guilty. The other anesthesiologist entered into negotiations with the government to try to arrange a deal but ultimately went to trial.

### The value of settlements in our legal system

As we have seen when considering summary judgment and *negligence per se* (the legal doctrine that a defendant who violates a statute enacted for the safety of the public is negligent without even considering the standard of care), preparing for and conducting a trial can be a very expensive undertaking. On the civil side ("civil" refers to trials that are noncriminal and do not carry the threat of imprisonment or the imposition of penalties unrelated to damage), the vast majority of cases are resolved not by trial but by settlement. Settlement is attractive because the parties have some control over the outcome. Settlement avoids the very considerable cost of trial, especially in an area such as anesthesia, where expert witnesses must be paid to investigate the facts of the case and be prepared to testify. Settlement also eliminates uncertainty, such as a jury that makes an emotional decision. On the civil side, the expense and uncertainty of trial has given rise to "magic bullets" like *res ipsa loquitur* ("the thing speaks for itself," a legal doctrine that the mere fact that damage occurs is, under certain circumstances, accepted as proof of negligence without the plaintiff having to prove it) and *negligence per se*, which make it easier and less expensive for a plaintiff to bring suit.

Criminal trials can be just as expensive as civil trials and the pressure for settlement just as great. Criminal defendants are encouraged to settle not only because of considerations of guilt or innocence, but also because their adversary is the government, an entity with substantially more resources than any individual defendant. Even prosecutors feel the need to settle. Government prosecutors have historically been underfunded and overworked. In addition, policy considerations favor settlement. There is a belief among criminal experts that high likelihood of punishment deters crime more effectively than severe punishment. That is, criminals are more likely to avoid criminal activity if they are more certain to receive even a lesser punishment than if they have a smaller chance of being punished but the punishment will be more severe.

These considerations, and the uncertainty of jury decisions that can be based on emotion, even in criminal trials, lead the prosecution to want to settle criminal cases. On the criminal side, we call settlement "plea bargaining," and the process has become familiar through film, television, and the occasional sensational case that is debated in newspaper columns.

### Constitutional protections for criminal defendants

Also affecting criminal prosecution is a series of protections for ordinary citizens, which are imposed by the US Bill of Rights. For at least the last 40 years, our legal system has held the belief that fundamental rights are best

assured when they are protected and observed at just those times when you least want to apply and observe them. Everyone gasps at Nazi storm troopers arriving to search houses in the middle of the night, but if the police “know” somebody is selling drugs, do we feel as passionately that they have to get a search warrant? Scholars and jurists have pointed out that you cannot protect the ordinary citizen’s right not to be subjected to unreasonable searches and seizures if you do not protect the rights of people accused of (and, perhaps, likely to have committed) crimes.

The right to be secure against unreasonable searches and seizures is one of many elements of the US Constitution’s Bill of Rights that were adopted in response to excesses of the British crown. One English tribunal, the Court of Star Chamber, prosecuted “enemies” of the Crown, including people who simply did not agree with the policies of the English government. Among the many abuses of this tribunal was the practice of forcing people who were felt to be unfriendly to government policies to convince the tribunal of their innocence without knowing what it was, exactly, that they had been charged with. Various techniques encouraged these individuals to defend themselves by confessing to crimes, theoretically to avoid prosecution for some other crime.

Many of the drafters of the US Constitution were lawyers who held an intimate knowledge of what government could do if left unchecked. From this knowledge came the Bill of Rights, including the Fifth Amendment’s protection against self-incrimination. But, of course, there is a fundamental conflict between the practical desire of the government to settle cases and the idealistic prohibi-

tion against self-incrimination. In our adversarial system, government prosecutors charge defendants with crimes for which there may be some, but not necessarily compelling, evidence. The process of trial resolves the claims. How can the government agree to a settlement without knowing what the criminal defendant has done? What would keep an unscrupulous prosecutor from hearing the confession, withdrawing the settlement, and prosecuting the defendant on his admission? What would happen to the protection against self-incrimination? This conflict has served as the basis of many plots for television and movies. And it was this conflict that appeared in the government’s recent case against an anesthesiologist.

The government has developed a way to pursue settlement discussions with criminal defendants without violating their Fifth Amendment right not to incriminate themselves. The technique is a *limited use immunity agreement*.

In many professional areas, participants deal with complex and complicated problems and develop their own language to describe the issues and problems that they see. For example, Certified Registered Nurse Anesthetists refer to a patient’s “crit,” a term that has no meaning to non-healthcare workers but that has meaning to all nurse anesthetists. Sometimes complex but otherwise routine problems are given catchy names in the slang that take hold in the profession. Law is no different. In the slang of government prosecutors, the limited use immunity agreement became known as the “queen for a day agreement.” It is a contract between the government and the criminal defendant in which the defendant agrees to provide infor-

mation in exchange for the government’s promise that statements made as part of the process will not be used against the defendant. “Queen for a Day” refers to a radio and television program, popular during the 1940s and 1950s in which contestants, selected by audience vote on the basis of heart-wrenching, unfortunate circumstances, were crowned queen for a day and awarded prizes.)

### **The pitfalls of being “queen for a day”**

In order to pursue settlement discussions, the anesthesiologist and her attorney appeared at the office of the prosecutor. The understanding was that the government prosecutor would not use information learned in settlement discussions in an inappropriate way. The anesthesiologist and her attorney were handed a queen for a day agreement, but they had not seen it before. The queen for a day agreement, which said that if the defendant anesthesiologist (the “queen”) presented her story to the government so that the government could decide whether it wanted to settle, the government would not base its case against her on the statements that she had made that day.

There were 2 exceptions to the government’s inability to use the anesthesiologist’s statements. The first was that the government reserved the right to use the defendant’s statements for the purpose of obtaining leads to other evidence and second, and most important, the government retained the right to rebut evidence or arguments offered by or on behalf of the defendant. That is, if the defendant admitted during settlement discussions that she had engaged in certain acts, the government could introduce her confession if at trial she said

she had not engaged in these acts.

Unfortunately for the defendant in this case, no settlement could be agreed upon, and the case went to trial. At the end of the trial, the jury could not reach a unanimous decision. A mistrial was declared, and the government announced its intention to retry the defendant.

While the government and the defendant prepared for the second trial, the government sent a letter to the defendant. The government pointed out that at the first trial the anesthesiologist's lawyer had addressed the jury and referred to the anesthesiologist's "innocence." In a criminal prosecution, the defense does not have to establish innocence. It merely has to provide sufficient doubt about the government's case, that guilt is not established "beyond a reasonable doubt." Defense attorneys have a variety of means to question the government's case. They can introduce evidence that someone else might have been involved or that the evidence is consistent with the guilt of another party.

The government pointed out that the anesthesiologist was not innocent, she had confessed, even though it was covered by the queen for a day agreement. So, when her lawyer referred to her innocence, the government claimed that under the queen for a day agreement it was free to offer her confession to dispute the lawyer's claim that she was innocent.

The defendant was shocked to learn that if her lawyer referred to her innocence, the confession she hoped would end this torture was going to make it worse. She took a chance when she met with the government and attempted to come to a settlement. Since it did not work out, the government was not supposed to use her confession against her as long as she did not lie. The

government responded that it had chosen the words of the queen for a day agreement carefully. When the anesthesiologist plea bargained with the prosecution, she was admitting that she had engaged in criminal activity. Her admission was inconsistent with the claim of innocence her counsel claimed before the jury.

How was the anesthesiologist going to defend herself if she could not try to make the jury believe she was innocent? How could the anesthesiologist have put herself in a position where the most she could say was "Well, if I'm guilty, the government has not proven it."

### **Hard lessons and fundamental rights**

Even though this was a criminal matter, any lawyer can sympathize with the disaster that occurred here. When the anesthesiologist and her lawyer went to a meeting with the government, the government handed them an agreement that the anesthesiologist and her lawyer were not familiar with. The government, however, had drafted the agreement, had used it before, and knew what they were trying to say.

You can imagine the hopes and fears of the anesthesiologist and her lawyer meeting with the government to try to resolve the case. The queen for a day agreement was just one more impediment before getting down to negotiations and seeing if a plea bargain could be worked out. The anesthesiologist's lawyer and a special agent who had been working for the government later testified that when the anesthesiologist and her lawyer came to the passage in the queen for a day agreement that the government is arguing should be read carefully, the anesthesiologist was told only that if she subse-

quently testified contrary to what she was going to tell the government, the statements could be used against her. No one said, "Well, looking carefully at this language, it may be argued that the government could introduce this confession to rebut arguments made by your lawyer." The anesthesiologist did not realize that the wording of the agreement would allow the government to use the confession even if all that had happened was that her lawyer used time-honored techniques to suggest that someone else was guilty of what she had been accused of.

As if this were not bad enough, the government prosecutor also warned the anesthesiologist's lawyer that the government might try to introduce the confession depending on how he cross-examined the government's witnesses. The anesthesiologist's attorney complained that his cross-examination was "chilled," and that he had to curtail his questioning of the government witness substantially to avoid disclosure of the damaging confession.

Because of their fear that the government would use her confession against her, the anesthesiologist sought a court ruling on the ability of the government to offer her confession in the second trial. In the argument, the anesthesiologist asked the court to determine that the queen for a day agreement was invalid because her confession was not knowing and voluntary. The anesthesiologist claimed that if the queen for a day agreement meant what the government said it meant, then it was much too vague for an agreement that waived very fundamental rights, such as the rights to cross-examination, to assert innocence, and to confront witnesses. If that was what the agreement did, then,

she claimed, it was equivalent to having no trial at all, and the agreement constituted a waiver of her right to a trial as guaranteed by the Sixth Amendment.

The government's position was fairly simple. The anesthesiologist was given the opportunity to read the agreement, and she was represented by knowledgeable counsel.

The court gave the anesthesiologist a substantial break. It ruled that waivers of constitutional rights had to be knowing and voluntary. Here, the anesthesiologist believed only that her confession could be used to impeach her testimony if she said something that was contrary to what she told the government. The anesthesiologist did not understand that her confession could also be introduced if her attorney succeeded in casting

doubt on the testimony of witnesses who were testifying to matters that were inconsistent with her confession, nor that her attorney was restricted from arguing things that were inconsistent with her testimony. Because her waiver in these areas was not "knowing" and therefore, not "voluntary," it was not effective, and the confession could not be used.

### **Conclusion**

Although the court protected the anesthesiologist in this instance, it is conceivable that the court could just as easily have ruled that the confession itself was voluntary and knowing. If the language of the queen for a day agreement constituted a waiver of fundamental rights, well, the agreement had been reviewed by both the defen-

dant and her attorney. If they felt pressure to sign it to start talking about a plea bargain, that was their problem. Whether or not they understood the details of the agreement, that is what it said. Had the subject matter of the agreement not been the defendant's constitutional rights, it is unlikely that the court would have given the defendant the same benefit.

From the standpoint of contract interpretation, this case shows how important it is to understand contracts and their terms fully and not be rushed while reading important and far-reaching documents. From the standpoint of criminal law, it shows how precious some of our safeguards are and the length to which courts will protect a criminal defendant's rights.